(3)

No. 86-1785

In The Supreme Court of the United States

October Term, 1987

MICHAEL COHL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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TABLE OF AUTHORITIES

CASES: PAGE

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The "Brief For the United States In Opposition" was filed on July 10, 1987 and served on Petitioner on August 17, 1987. Petitioner offers the following in reply to arguments made by Respondent:

1. Respondent's argument is premised on the claim that it did not matter whether "caps" or "ingot butts" were removed from J & L and shipped in interstate commerce. Thus, Respondent asserts that "the actual form of the stainless steel was a technical matter of little interest to the prosecution or the defense" and that whether shipments contained caps was "immaterial to the question of guilt or innocence." "Brief

For The United States In Opposition'' at 8. The record does not support Respondent's position.[1]

Robert M. Visokey was plant manager at J & L Steel's Warren plant and negotiated the contract between J & L and SMC. (T. 5/1/85: 196–197) Visokey testified that ''caps'' were a type of pit scrap that was included in the contract. (T. 5/2/85: 22) Although Visokey claimed that ''large'' caps should have been reclaimed by J & L employees, he admitted there was no ''exact break'' between large and small caps and that the company ''would not have been overly alarmed'' if caps were received by SMC and resold to J & L. (T. 5/2/85: 48, 50)

The distinction between ''ingot butts'' and ''caps'' was clearly made by Visokey in his response to the prosecutor's questions:

Q. Now, you indicated that — or I asked you if [Michael Cohl] had made any claim to ingot butts.

A. He did not.

Q. Was there any dispute as to — or did he state anything to the nature, he should be getting large buttons or caps?

A. I don't recall that there was any discussion above size per se. I think it more related to quantity, which would convert to revenue, rather than size of an individual piece.

Q. During the entire course of these negotiations and afterwards in your subsequent contact with Mr. Cohl

[1] Respondent notes that ''petitioners did not seek to distinguish between ingot butts and caps at trial'' and that counsel for co-defendant Gregory stated to the jury that ''all the counts are the same.'' (''Brief For The United States In Opposition, at 8, n.4) Respondent, having concealed evidence that the shipments contained caps as well as ingot butts at trial, now attaches significance to Petitioner's failure to argue evidence to the jury that was concealed from him until it was too late to do so.

or any other member of SMC, can you recall anything that was stated that would indicate that they had any right to ingot butts or caps?

A. Ingot butts or caps?

Q. Yes.

A. They're separate.

Q. I'm sorry. Ingot butts are large — well, let me say, first of all, ingot butts.

A. *Ingot butts, as an issue, clearly from my viewpoint and the company's viewpoint, were absolutely outside this contract.* They were never contemplated to be taken or sold or bought back. We don't do those things as a business practice, absolutely not.

Caps, certainly, caps come from a refuse stream, if you will, the slag-end of the business. It is very conceivable and we did discuss caps. *Caps in general were a type of scrap, a type of pit scrap that was in the contract.*

The question of caps becomes as to the size, not — not the — that physically they were not included; they were included in the contract. That is part of pit scrap. Ingot butts are not.

(T. 5/2/85: 21-23) (emphasis supplied)

If "caps" were mixed with "ingot butts" in shipments that SMC sent out-of-state for sale — as Norman Reese told the prosecutor but denied before the jury — the prosecution could not establish that any particular shipment contained over $5,000 worth of stolen stainless steel. The mixing of "ingot butts" and "caps" in shipments would make it impossible for Reese to discern how much of each load was stolen steel, *i.e.*, "ingot butts", and how much was scrap steel allowed to be taken under the contract, *i.e.*, "caps". The $5,000 jurisdictional amount, required for conviction under 18 U.S.C. Section 2314, could not have been established.

As found by the district court[2], a new trial is required. A reasonable probability existed that, "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Petitioner was entitled to disclosure of Reese's statement in time to use it at trial. Having been denied the information when it should have been disclosed, Petitioner is now entitled to a new trial.

2. Respondent denies this case involves the solicitation of false testimony by the government attorney. It restates the position taken in the district court "that Reese's sworn testimony at trial in the presence of his former employees deserved more credence than his informal, unrecorded, and unratified out-of-court statement." ("Brief For The United States In Opposition" at 9, n.5)

Respondent's claim that Reese's trial testimony "deserved more credence" than his earlier statement is unconvincing. Reese was no longer employed by SMC at the time of his trial testimony. He admitted that he had received $5,000 for his part in stealing from Petitioner's company. (T. 5/22/85:102) He had been granted complete immunity in exchange for his testimony. (T. 5/21/85: 156) Reese's position at trial was clearly that of an adversary to Petitioner.

The prosecutor undoubtedly preferred the version Reese gave on the witness stand to the earlier version he had given. There is, however, no suggestion by Respondent as to what

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[2] Respondent's assertion that the "court of appeals and the district court both correctly rejected" ("Brief For The United States" at 6) the contention that the government violated Petitioner's rights by failing to disclose exculpatory evidence is misleading. After initially denying Petitioner's new trial motion, the district court reconsidered the matter and found a new trial was required. The district court ultimately denied Petitioner a new trial only because it believed it had no jurisdiction to do so. (Pet. App. E)

motive Reese had to lie to the prosecutor and his case agent when he told them, before trial, that "caps" and "ingot butts" were mixed in the out-of-state shipments. It appears that the trial testimony was considered more "truthful" by the prosecutor simply because it assisted him in obtaining his conviction.

Regardless of whether the prosecutor believed that the testimony was true, however, it was not for him to decide whether Reese had lied at trial or before trial. The jury, not the prosecution, should have been permitted to make that determination. The prosecutor withheld information that he knew was contradictory to the favorable testimony he elicited from Reese on the witness stand. He was obligated to provide Petitioner with that information and allow the jury to determine where the truth lied.

3. No evidentiary hearing has ever been conducted regarding the allegations that the prosecutor committed misconduct in failing to provide timely disclosure of the statements by Norman Reese.

Respondent maintains that Reese's trial testimony has not been shown to be false. ("Brief For The United States In Opposition," at 9, n.5) However, no opportunity has ever been afforded Petitioner to confront Reese with his earlier statement in an effort to establish that his trial testimony was false.

Respondent restates the government's position in the district court that they did not intentionally solicit false testimony from Reese. (*Id.*) Yet, no record has been made that would establish that the government trial attorney reasonably believed Reese had lied to him before trial but was testifying truthfully at trial.

Respondent asserts that Petitioner and his co-defendants "apparently attached little significance to Reese's prior statement when they learned of it during trial." (*Id.* at 6) There is,

however, no record as to exactly what defense counsel were informed or what options, if any, were considered available to them at the time of the disclosure.[3]

Petitioner was denied a fair trial by the withholding of highly material, exculpatory evidence until it was too late to be of any use to him. This was recognized by the district court when it granted Petitioner a new trial. In the appellate courts, however, the government has relied on a lack of record regarding the prosecutor's motives, defense counsel's actions, and the actual truth or falsity of Reese's trial testimony in an effort to defend the misconduct that occurred here.

This case should be decided on the record rather than Respondent's self-serving speculations. Any uncertainties as to the facts should be resolved by a remand to the district court rather than reliance upon the unsupported assertions of Respondent.

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[3] The suggestion that defense counsel failed to preserve the issue for appeal begs the question. Defense counsel were first made aware of Reese's earlier contradictory statement on the fourth day of jury deliberations, sometime between 9:10 a.m., when a question from the jury was considered, and 10:45 a.m., when the jury returned its verdict. (T. 6/5/85: 5; Motion For New Trial, C.A. 94) The prosecutor's revelations came over one month after he had assured the district court that defense counsel had been told of statements that came to his attention during his pretrial interview of witnesses (T. 5/2/85: 27) and more than two weeks after Reese had testified that "ingot butts" and "caps" were not mixed in out-of-state shipments. (T. 5/22/85: 178, 182)

For these reasons and those set forth in the petition, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September, 1987